Memorandum

United States Attorney
Western District of Washington

Subject	Date
Backpage.com Investigation Update	January 16, 2013

To	From
Jenny Durkan, USA Annette Hayes, FAUSA Robert Westinghouse, Criminal Chief	John T. McNeil, AUSA Aravind Swaminathan, AUSA

I. Introduction

This memorandum provides an update on the investigation of Backpage.com, LLC and related entities and individuals. It is aimed at supplementing the memorandum dated April 3, 2012, which outlined the primary theories of prosecution and what we knew of the facts at that time.

As outlined below, the investigation has progressed steadily over the last several months. We have obtained subpoena responses from more than a dozen entities and individuals, and have made a preliminary review of more than 100,000 documents.[1] We have interviewed approximately a dozen witnesses, and have taken extended grand jury testimony from an additional six witnesses, most of whom are current Backpage employees.[2] As a result,

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[1]Among the entities we have subpoenaed for documents are: Alta Communications, Arizona Dept of Economic Security, Brynwood Partners, Craig Capital, Duff & Phelps, El Camino Technologies, Goldman Sachs, Najafi Companies, National Center for Missing and Exploited Children, Trimaran Fund Management, David Zucker/Lead Lap, Washington Attorney General's Office, US Bank and the credit reporting companies. We have also issued a series of subpoenas to Backpage.com LLC and Village Voice Media Holdings, LLC which are currently the subject of litigation before Judge Jones.

[2]Included among the interviews are: Scott Lebovitz (managing director at Goldman Sachs); David Schneiderman (former CEO of Village Voice); William Egan (investor/debt holder of Village Voice Media Holdings); David Zucker (potential purchaser of Backpage in 2011 and former COO of Playboy); David Althoff (managing director of Duff & Phelps); Jacob Rapp (Duff & Phelps analyst); Karkeek Sundeep (Duff & Phelps analyst); Ayesha Johnson (former prostitute and Backpage user); Ernie Allen (former CEO of NCMEC); and various members of the NCMEC staff including its current Executive Director. Those testifying in the grand jury included: Joe Kaiping (Backpage technical operations manager); Cathleen Wingfield (Backpage fraud moderator); Joye Vaught (Backpage Asst Operations Manger); James Hammer (Backpage moderation supervisor); Raymond Ronan (Backpage Support Section and Abuse Section team leader); and Charles Craig (principal of Craig Capital, potential purchaser of

we have a reasonably clear sense of the ownership, financing and internal operations of Backpage.com.[3] There remain, however, significant gaps to fill in our knowledge. Most notably we have received nothing of substance in response to our subpoenas to Backpage and Village Voice Media Holdings, LLC ("VVMH"). In addition, we have yet to elicit in the grand jury, or find in the documents obtained from other sources, the kind of smoking gun admissions which we had hoped would propel this investigation to indictment.

In addition to updating the evidence related to the theories of prosecution which were outlined in the April memorandum, this memorandum outlines money laundering charges which may be applicable to this case. It also provides a preliminary assessment of the most significant hurdles to bringing a successful prosecution as well as a detailed description of the evidence related to Backpage's site monitoring efforts and a discussion of Backpage's potential advice of counsel defense.

While this investigation is not complete, it is our current assessment that absent the discovery of compelling admissions in internal Backpage documents, a successful criminal prosecution of Backpage is unlikely. As noted, we have yet to uncover documents or testimony in which key participants made candid admissions to the use of the site for prostitution. To the contrary, witnesses have consistently testified that Backpage was making substantial efforts to prevent criminal conduct on its site, that it was coordinating its efforts with law enforcement agencies and NCMEC, and that it was conducting its business in accordance with legal advice from outside counsel.

Moreover, the criminal statutes potentially applicable to this case have never been litigated in a similar context.[4] While applying statutes in a novel manner may be appropriate

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Backpage.com in 2011). Two additional witnesses, Andrew Padilla (Backpage Operations Manager) and Tamara Nickel (Backpage Operations Manager), were subpoenaed to appear during the week January 14, 2013. Despite substantial notice, they did not retain counsel until the week before their appearance and their appearances have been postponed. We believe that the delay in their appearance was a strategic delay engineered by Backpage lawyers. We do not expect to call any supervisors above Padilla and Nickel at Backpage absent significant consideration. Any such witnesses will insist on immunity and the two people immediately above the operations managers, Carl Ferrer and Scott Spear, have as much potential culpability as any individuals in the companies. Attached as Exhibit 1 is a list of the primary players in this investigation.

[3]While this memorandum does not detail the history of Backpage and its evolution from a small classified website to the primary competitor with Craigslist, attached as Exhibit 2 is a Casemap Timeline which provides important milestones in the evolution of the company.

[4]The sole exception to this was the case brought against the owners of "escorts.com" by the Middle District of Pennsylvania. Two companies pleaded guilty to a one count money laundering Information after more than three years of investigation and the civil seizure of more

where the there is readily provable criminal intent, in this case we have yet to uncover compelling evidence of criminal intent or a pattern of reckless conduct regarding minors.

In addition to the significant legal and factual hurdles in this case, it is telling that we have not been able to garner sufficient law enforcement resources to properly work this case. Despite substantial efforts, we have only the limited involvement of one federal agency. This has significantly hampered the investigation and is likely to get worse rather than better in the near future.

II. Update on Original Theories of Prosecution

The April memorandum outlined two theories of prosecution: 18 U.S.C. § 1591(a)(2) (knowingly benefitting financially from participation in a venture in reckless disregard of the fact that the venture causes minors to engage in commercial sex acts); and 18 U.S.C. § 1589(b) (knowingly benefitting financially from participation in a venture in reckless disregard of the fact that the venture uses force or threats to coerce labor services).[5] With respect to the § 1589 theory, to date we have found no evidence that Backpage intentionally or recklessly accepted money from a venture engaged in the use of force or threats to coerce commercial sex acts. As noted in the April memorandum, we continue to believe that it would be very difficult to proceed on a § 1589 theory, and despite significant investigation, no facts have come to light which alter this assessment.

With respect to Section 1591, to date we have found two instances in which Backpage

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than $30 million. The plea called for approximately $25 million to be returned to the companies and related individuals. The plea obviated the need for any litigation over the novel legal theory being pressed in that case. Discussions with the AUSA in the Northern District of California about the investigation of "myredbook.com" (which has been ongoing for almost two years) and with attorneys at CEOS about past assessments of prosecuting Backpage and similar on-line entities revealed few insights and no persuasive theory on which to prosecute such on-line entities. Notably, even though the language on "myredbook.com" is more explicit than that on Backpage, and there is a cooperator who appears to have seen frank admissions from the operator of that site, the prosecutors are seeking to establish intent through finding admissions on the network server. They are currently not inclined to rely on the content of the site to establish criminal intent. Moreover, they do not hold out much hope of a successful prosecution of "myredbook.com."

[5]We have also discussed internally whether a wire fraud charge under 18 U.S.C. § 1343 could be brought based on misrepresentations to the VVMH Board of Directors by officers and employees of the company, or misrepresentations by VVMH/Backpage to potential investors. To date we have yet to find evidence of such material misrepresentations and, based on what we have learned, we are unlikely to find such evidence. Thus, a wire fraud theory does not appear viable in this case.

continued to post advertisements of minors engaged in "escort" services after it had been notified by law enforcement that they were juveniles engaged in prostitution. In the instance of "T.R.", as part of an investigation into her pimp, the FBI notified Backpage on February 13, 2012, that T.R. was a juvenile prostitute and asked that her ads be taken down. While Backpage took the ads down, T.R. subsequently used the same email address and Backpage user account to post advertisements on Backpage in June and July 2012. Thus, in the case of T.R., Backpage benefitted financially from posting advertisements for T.R. after being notified that she was engaged in commercial sex acts.

In the second known case, Backpage was notified by the Seattle Police Department on June 11, 2012, that "C.C." was a juvenile prostitute, and was requested to take her advertisements down. Over the next several weeks Backpage continued to accept and post advertisements from C.C. despite the Seattle Police Department notice. It appears that in the case of C.C., Backpage benefitted financially from posting her advertisements after being notified that she was a minor engaged in commercial sex acts.

While these two instances could form the basis of an indictment under Section 1591, the financial benefit of this criminal conduct is *de minimis* and they occurred at a time during which Backpage was actively engaged in working with law enforcement to rid its site of juvenile prostitution. These two juveniles account for a handful of $7 advertisements in an annual revenue stream of approximately $40 million. Moreover, any case brought which is aimed at juvenile prostitution on Backpage will be met with a significant factual and legal defense regarding the efforts the company was making to rid the site of juvenile prostitution. Even Ernie Allen, the former CEO of NCMEC and a harsh critic of Backpage, has admitted in an interview that he believed that Backpage was genuinely trying to rid its site of juvenile sex trafficking. He also said that he believed that the use of the Internet to market commercial sex was so fluid that any system of moderation and reporting was destined to fail. Thus, there is serious question whether a case brought on these two instances, and possibly a handful more, would persuade a jury to convict Backpage of a felony. Moreover, even if a jury were to convict on a handful of offenses, such a victory would be largely Pyrrhic. Unlike the typical business organization, which has government contracts and could be debarred or which needs funding or other support from mainstream banks or corporations, Backpage is a highly profitable self-sustaining company which does not rely on government contracts or other major corporations. Backpage could simply continue its operations after a felony conviction.

There are undoubtedly other instances similar to T.R. and C.C. The question is whether these were isolated instances that slipped through the crack or whether they formed a larger pattern of recklessness. We subpoenaed that information from Backpage many months ago, but our motion to compel has been stalled in Judge Jones's session for many weeks.[6] Absent a

[6]Briefing on our motion to compel was completed on October 30, 2012, and Judge Jones has had the matter under advisement since then. We recently called Judge Jones's clerk and she said that a ruling was imminent. If we do not receive a ruling in the next week, we intend to

response from Backpage to our subpoena, ferreting out these cases has been difficult. We have recently made a formal confidential request for such cases from our federal and state partners in Washington and Oregon via the Innocence Lost Task Force. We are awaiting their response.

III. Alternative Theories of Prosecution: Money Laundering

Since the April memorandum, we have identified several potential money laundering charges. These charges focus not on Backpage as a publisher of on-line advertisements or as a co-venturer with pimps, but as a launderer of funds derived from adult prostitution which has an interstate nexus. It is our current assessment that Backpage genuinely wanted to get child prostitution off of its site but was perfectly willing to accept money from the adult prostitution business, so long as advertisements were not too blatant. (A review of the VVMH print publications out of which Backpage grew, and the interview of the former CEO of The Village Voice, reveals that the papers received substantial income from adult "escort" advertisements which appear to be thinly veiled advertisements for prostitution such as now appear on Backpage.) Some witnesses (Craig, Ronan, Zucker) testified that Backpage wanted juvenile prostitution off the Backpage site because the company was committed to protecting vulnerable boys and girls. Others, more cynical, could readily conclude (but no one has so testified) that Backpage wanted to eliminate child advertisements from its site so that it could carry on with the more lucrative adult escort/prostitution business.

Unfortunately (and remarkably), we have yet to find a witness – either within Backpage or who had close ties to Backpage – to admit that the company knowingly accepted adult prostitution advertisements. We had expected to find some witness who would testify that they were aware that the escort advertisements were for prostitutes but that they had been advised by legal counsel that publishing those advertisements was protected by the Communications Decency Act ("CDA"), 47 U.S.C. § 230. Nonetheless, the money laundering theories outlined below address potential criminal conduct associated with adult prostitution advertisements in contrast to the potential Section 1591 charges which are aimed at juveniles.

Laundering $10,000 in Proceeds

There are three potentially applicable money laundering charges in this case. The first is a charge under 18 U.S.C. § 1957. That section criminalizes a monetary transaction in an amount greater than $10,000 with funds which are proceeds of a specified unlawful activity. In this case, the specified unlawful activities are twofold: violations of 18 U.S.C. § 1952 (use of a facility in interstate commerce with intent to promote, and thereafter a performance of, a prostitution offense in violation of state law)[7]; and violations of 18 U.S.C. §§ 2421 and 2

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make a formal motion for a status conference on the case.

[7]Section 1952 reads in pertinent part:

(a) Whoever . . . uses . . . any facility in interstate or foreign

(aiding and abetting the interstate transportation with intent that an individual engage in prostitution)[8]. The elements of the Section 1957 offense are:

FIRST, the defendant must knowingly engage or attempt to engage in a monetary transaction[9];

SECOND, the defendant must know that the transaction involved criminally derived property[10];

THIRD, the criminally derived property must be of a value greater than $10,000[11];

> commerce, with intent to –
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> . . .
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform-- (A) an act described in paragraph . . . (3) shall be fined under this title, imprisoned not more than 5 years, or both;
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> . . .
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> (b) As used in this section (i) "unlawful activity" means (1) any . . . prostitution offenses in violation of the laws of the State in which they are committed or of the United States . . .

[8]Section 2421 reads in pertinent part:

> Whoever knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned . . .

[9]"[T]he term 'monetary transaction' means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds . . ." 18 U.S.C. § 1957(f)(1).

[10]"[T]he term 'criminally derived property' means any property constituting or derived from, proceeds obtained from a criminal offense." 18 U.S.C. § 1957(f)(2). The relevant jury instructions read "[t]he government must prove only that defendant knew that the property involved in the monetary transaction constituted, or was derived from, directly or indirectly, proceeds obtained by some criminal offense. It need not prove that he/she knew the precise nature of the criminal offense from which the proceeds derived.

[11]Under prevailing Ninth Circuit decisions, the co-mingling of criminal proceeds and lawful proceeds can pose substantial proof problems. Under Section 1957, at least $10,000 of pure criminal proceeds must be deposited or withdrawn on one or more occasion. *See United*

FOURTH, the criminally derived property must also, in fact, have been derived from a specified unlawful activity (here, violations of 18 U.S.C. §§ 1952, 2421 and 2); and

FIFTH, the monetary transaction must have taken place in the United States.

See Ninth Circuit Model Criminal Jury Instructions (2010 Ed.) § 8.150.

The primary difficulties with bringing such a charge in this case are threefold. First, we need to prove beyond a reasonable doubt that the company knew that the advertising fees being paid by adult "escorts" were criminally derived property. We have yet to obtain compelling evidence that Backpage admitted the use of its site by prostitutes. Remarkably, neither employees of Backpage, nor the investors who sought to purchase Backpage testified about candid discussions concerning prostitutes' use of the site to advertise sex for a fee. Instead, Backpage employee witnesses denied having anything other than superficial conversations about that subject matter. While one Backpage employee (Wingfield) said she was reluctant to tell people where she worked because of all the bad press, she would not admit to having anything other than brief conversations about the topic with anyone other family members. Likewise, potential investors who were performing due diligence testified that whenever the issue of unlawful conduct on the site was raised with Backpage executives, they were told that the screening process was highly effective at keeping advertisements for unlawful conduct off of the site and that Backpage had a close working relationship with law enforcement officials.[12]

States v. Rutgard, 116 F.3d 1270, 1292-93 (9th Cir. 1997). Thus, in this case the government must prove that there was one or more transaction in which at least $10,000 of pure prostitution proceeds was involved. In cases where many unlawful transactions are aggregated to make up the $10,000, the government typically argues that the entire business in which the defendant was engaged was criminal, and that any transfer in excess of $10,000 would meet the threshold. *See United States v. Hanley*, 190 F.3d 1017, 1025 (9th Cir. 1999). We cannot so argue in this case because there is no evidence that the non-adult advertisements are illegal (for autos, real estate, etc.), and it appears that some portion of the adult escort and massage advertisements are legal. Based on information obtained to date, it does not appear that the revenue streams from advertisements were segregated in any fashion. Therefore, we may be relying on some form of statistical analysis to establish this element; *i.e.* we introduce evidence that Backpage financials show that the adult revenue makes up X% of all revenue and we introduce expert testimony establishing that at least X% of the adult revenue was from prostitution advertising. We charge a few transactions which are so large that the jury can conclude beyond a reasonable doubt that at least $10,000 of the transaction was from prostitution. As is evident, this element poses a very substantial hurdle to criminal prosecution because of its reliance on probabilities. (Also, it is far from clear that we can obtain a reliable expert opinion on what percent of adult ads are for prostitution.)

[12]We have learned of two statements from VVMH representatives which could be used to assert that Backpage admitted its knowledge of the site's use for prostitution. In a meeting on

While these potential investors had "questions" about the nature of the advertisements, they were convinced that the combination of strong monitoring and the protections of the CDA were sufficient to operate the site lawfully.

The best evidence gathered to date about Backpage's knowledge of the criminal nature of the source of the funds is what Backpage did not do in the face of a barrage of criticism that it was the Internet's leading site for on-line prostitution. While Backpage made efforts to rid the site of express offers of sex for a fee – by eliminating references to explicit sex acts on its escort pages and eliminating reference to payment for sex on its adult personal pages, among other things – it took few steps to ban users who were obviously prostitutes. So, for instance, if a user submitted a naked photo or one with an explicit sex act to accompany an escort advertisement, the photo would be deleted, but the advertisement would not be. Moreover, the user would not be banned from using the site; to the contrary, the user could continue to use the same user account even if her advertisements were edited or deleted because they violated the site rules. Likewise, if a prostitute tried to use any of the banned terms in drafting her advertisement, the terms would be excluded by a computer program, but the prostitute would not be banned from using the site. Notably, Backpage had the technology not only to ban a user from the site (by reference to an email address, credit card, user account, telephone number, or name), but also to check other similar sites to confirm or deny a suspicion that a user was engaged in prostitution.[13] The fact that Backpage had very weak protocols for addressing offers of sex for a fee meant that prostitutes could use the site so long as they did not use explicit terms or pictures. That Backpage employed such weak protocols, despite repeated warnings about the volume of prostitution on its site, could be employed as evidence of knowledge that the source of the funds was prostitution.

March 1, 2011, between Ernie Allen, the CEO of NCMEC, and VVMH and Backpage representatives, owner Michael Lacey told Allen that Backpage would address child prostitution on its site but that adult prostitution was none of NCMEC's business. Allen responded that, "at least you know what business you are in," to which Lacey did not reply. The State Attorney Generals made much of the statement by VVMH Board Member Don Bennett Moon in June 2011 that he could not "deny the undeniable" when pressed in a meeting about the potential use of the site by prostitutes. (AGWA0000511). However, these exchanges are slim admissions on which to hang a federal felony charge.

[13]It is frequently the case that users post an ad on Backpage which has the requisite veiled language and suggestive photos, but also has more explicit reviews, ads and photos on other sites. If one takes a Backpage user's telephone number or "name" and searches it in Google, it is easy to find advertisements or reviews on other sites. There was a time when Backpage users could provide a link in their ad to reviews of their services on sites such as "theeroticreview.com" or "myredbook.com." Those two sites – known as "john boards" – post explicit reviews of the person's services (*e.g.* "That was the best bbbj I have ever had for $200. Will go back again."). In 2012, Backpage began prohibiting such links in escort ads.

The problem with this method of proving intent is that in the course of introducing evidence about what Backpage did not do to monitor its site and exclude prostitutes, much evidence would be admitted about what Backpage did do to monitor its site. In particular, Backpage will be able to cross-examine its own employees (who will be government witnesses likely testifying under grants of immunity) about what they did to prevent illegal conduct. Since those witnesses have largely claimed in the grand jury that Backpage was making substantial efforts to prevent illegal advertisements and they were very proud of the efforts being made, there will be rich fodder for leading cross-examination by the defense. So, for instance, those witnesses will likely testify about the express warnings placed on the site and circulated in the company prohibiting advertisements for illegal conduct, including bans on sex for a fee. It would also open the door to all sorts of evidence about what Backpage did to work with law enforcement to stop child trafficking. Backpage may also be able to introduce statements by experts in the field, such as Ernie Allen, to the effect of: Backpage does more monitoring and reporting than any site involved in adult classified advertising and no matter what kind of monitoring and reporting a site does, there will still be ways for prostitutes and pimps to get around it. (Allen said this in an interview with us and has also publically stated this as reported in widely circulated publications.)

It might be argued that the best evidence of intent is the content of the site itself: that the advertisements of women posing in sexually suggestive poses, wearing virtually nothing and advertising various forms of sexual massage and other "good times" for a fee is plainly evidence of prostitution. However, as we are learning in this investigation, few people – whether they work at Backpage or not – automatically draw this conclusion. Many (e.g. Lebovitz, Craig, Althoff) say it "may" be prostitution, but it could well be offers for legal adult services. Upon closer analysis of the adult web market, it is clear that there are many adult services which come very close to prostitution, but which are lawful. For instance, it is legal to advertise to pay actors to have sex in a film. As a result, Backpage's rules for what could be advertised in the adult jobs section were different than other adult sections. It is also legal to offer or solicit sex, so long as it is not in exchange for money. Thus, Backpage permitted express references to sexual acts in its adult personal section. It is also legal to offer to be a "sugar daddy" – offering to take care of someone in exchange for companionship. Again, Backpage had rules permitting "sugar daddy" advertisements in its personals section. Likewise, strippers or escorts may be paid to simulate sex for a fee, to dance or perform solo sex acts, to provide companionship, and to give "sensual" massages. There are no rules which prohibit strippers or genuine escorts from posing in sexually explicit positions or from giving hands-on therapy. The prohibition is only on offering, and engaging in, sex acts for a fee. Thus, while someone who has little experience with the adult services market may readily conclude that Backpage's escort advertisements offer prostitution services, such a conclusion is not so plain after one recognizes how much sexually explicit commercial conduct is lawful.

A second significant hurdle to proving this money laundering crime is that even if we were to develop compelling evidence that Backpage knew its site was routinely used by prostitutes, we would then have to prove beyond a reasonable doubt, through inferences, that the fees paid by prostitutes to advertise future sex for a fee were from the proceeds of past acts

of prostitution. While this may seem an obvious inference at first, one has to consider the role of pimps in the payment process. An independent prostitute could testify that she posted an ad with money she received from a prior sex act. How we then extrapolate this to all prostitutes in a criminal case is unclear. In addition, according to agents, most prostitutes have their funds controlled by a pimp, and may not be able to testify with any certainty regarding the source of the funds if the pimp handled the debit card payments to Backpage. This poses a separate inferential/evidentiary hurdle.

Finally, we would need to overcome the substantial evidentiary hurdle of establishing a pure $10,000 prostitution proceeds transaction as set forth above. In particular, it appears we would be required to rely on expert testimony, statistical analysis and inferences to prove that any one transaction was made up of $10,000 of prostitution proceeds. While relying on such evidence in a civil case may be common, reliance on this type of evidence would be extraordinary in a criminal case to establish an element of the offense beyond a reasonable doubt.

Laundering with Intent to Promote Prostitution

The second applicable charge is one under 18 U.S.C. § 1956(a)(1)(A)(i).[14] This section criminalizes a financial transaction with funds which are proceeds of a specified unlawful activity, with the intention of promoting that crime. Here the specified unlawful activities are violations of 18 U.S.C. §§ 1952, 2421 and 2. The elements of the offense are:

FIRST, the defendant conducted [or attempted to conduct] a financial transaction[15] involving property that represented the proceeds[16] of some form of unlawful activity, here a federal or state prostitution felony;

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[14]That statute reads in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
> (A)(i) with the intent to promote the carrying on of specified unlawful activity is guilty of an offense against the United States.

[15]"The term 'financial transaction' means . . . (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)(4).

[16]"The term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9).

SECOND, the defendant knew that the property represented the proceeds of a specified unlawful activity, here violations of 18 U.S.C. § 1952 (use of a facility in interstate commerce with intent to promote, and thereafter a performance of, a prostitution offense in violation of state law) and 18 U.S.C. §§ 2421 and 2 (aiding and abetting the interstate transportation with intent that an individual engage in prostitution)[17]; and

THIRD, the defendant acted with the intent to promote the carrying on of the specified unlawful activities.

See Ninth Circuit Model Criminal Jury Instructions (2010 Ed.) § 8.146. This charge eliminates the requirement under Section 1957 to establish a single $10,000 transaction with proceeds from prostitution. Instead it requires that the government prove Backpage's intent to promote prostitution.

This charge also presents several substantial proof issues. There are two ways we could charge this: charging a "micro" case which focused on several individual prostitutes or charging a "macro" case which focuses on the larger stream of money from the operation. Both present hurdles. With respect to a "micro" case, it would not be difficult to prove several individual instances in which prostitutes in fact paid Backpage with the proceeds of their crime (assuming, as outlined above, that the prostitutes were independent from a pimp). However, it would be very difficult to prove in those specific instances that Backpage had the specific intent to promote these individual prostitutes' ongoing crimes. Backpage could readily argue that it simply posted user-content which it has screened for obvious criminal conduct, and that it has neither the knowledge nor intent to further the criminal conduct in which these women were engaged. Backpage would call witnesses to testify that if they had knowledge that the particular users were using their site for an unlawful acts, they would have deleted their ads and possibly banned them from using the site. Moreover, Backpage will present evidence that the specific ads charged represented a tiny fraction of the thousands of ads posted on that day.

With respect to a "macro" money laundering promotion case, we would need to put together charges, based largely on inferences at this point, that Backpage had a specific intent to promote prostitution generally by operating its web site. Again, this will not be easy absent admissions from Backpage employees or managers. We could seek to prove it by calling widely recognized experts in the field (such as former NCMEC CEO Ernie Allen and/or a former state Attorney General) and have them testify about working with Craigslist to limit prostitution on its site, the movement of prostitution business from Craigslist to Backpage when Craigslist shut down its site, and then their confrontation of Backpage with the fact that their site was rife with prostitution. We could subsequently argue that Michael Lacey's response to

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[17] "The term 'knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity' means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law. . ." 18 U.S.C. § 1956(c)(1).

Allen's accusations ("adult prostitution is none of your business") and Backpage's failure to refute the accusations as evidence of its knowledge and intent to continue in a business dominated by prostitution. However, as noted above, this is a very risky means of seeking to prove criminal intent. While corporations do not have a Fifth Amendment right, it raises substantial issues about using inferences drawn from obtuse statements and silences to prove an element of the offense.

A second significant evidentiary challenge with respect to a "macro" case is how to establish that most or all of the revenue stream from adult advertising is from prostitution. As noted above, it appears the only way to do this is through expert testimony regarding the percentage of prostitution advertisements on Backpage.

Money Laundering Conspiracy

The third applicable charge is a conspiracy charge under 18 U.S.C. § 1956(h). This section criminalizes conspiracies to violate any part of § 1956 or § 1957. The elements of the offense are:

FIRST, beginning on or about [date], and continuing through the date of the Indictment, there was an agreement between two or more persons or entities [here, Backpage.com LLC and Village Voice Media Holdings LLC, and the companies' officers and directors[18]] to commit a violation of 18 U.S.C. § 1957 (laundering of proceeds of a specified unlawful activity in an amount greater than $10,000) or 18 U.S.C. § 1956(a)(1)(A)(i) (laundering of proceeds from a specified unlawful activity with intent to promote that unlawful activity); and

SECOND, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

See Ninth Circuit Model Criminal Jury Instructions (2010 Ed.) §8.10. Section 1956(h) does not require that the government prove an overt act in furtherance of the conspiracy. *Whitfield v. United States*, 543 U.S. 209, 219 (2005).

Conspiracies are often charged when there is substantial evidence of criminal intent but where the completed crime is difficult to prove. Here, if the government were able to establish that Backpage and VVMH had the specific intent to launder the proceeds of prostitution and/or to promote prostitution by laundering funds, then bringing a conspiracy charge would alleviate many of the concerns raised above about establishing the underlying substantive offenses. Yet, as outlined above, we have yet to develop direct evidence of Backpage's criminal intent. As a result, we will be left to argue inferences of a specific criminal intent in the face of evidence

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[18]*See United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir. 1994)("[A] corporation may be liable under § 371 for conspiracies entered into by its agents and employees.").

that Backpage was engaging in extensive monitoring of the content on its site. We could, as noted above, put on evidence of what Backpage did not do to prevent prostitutes from using its site as evidence of intent to engage in a money laundering offense. But the risks of proceeding in that fashion are substantial.

IV. Assessment of Backpage's Monitoring Process

At the core of any case against Backpage will be the evidence of its efforts to monitor the content of advertisements on the site and what it did when it found users who were violating its terms of use. As discussed above, Backpage's efforts to monitor and rid the site of child trafficking presents a very substantial hurdle to prosecution. At the same time, what Backpage chose not to do is also telling of its intent to permit known prostitutes to use its site. This section summarizes the facts uncovered to date regarding Backpage's monitoring efforts.

For a number of years prior to the fall of 2010, there was loose moderation of the adult advertisements on Backpage. Moderators were employed at the VVMH/Backpage offices in Phoenix. Their work was overseen by Carl Ferrer, the individual who started Backpage in the spring of 2003, and several managers below him. There was a single level of ad moderation. Moderators were assigned to geographic areas and would review ads that were already "live" on the site. (There was also some filter for words prior to 2010, but it is unclear how that filter worked.) Thus, during that period, rather than screen the ads before they were posted, the core moderation occurred after the ad had been up on the site for some period. While express offers of sex for a fee were prohibited on the site, and certain sex terms were not permitted on the escort page, the rules for photos were much more lax. For instance, full frontal nudity of both men and women was permitted prior to the fall of 2010.

Starting sometime just prior to the fall of 2010, Backpage began a two-tier moderation process. The first tier of moderation (called "monitoring the queue" or "Tier I" moderation), was to review new advertisements and advertisements which had been recently edited. All adult advertisements were placed in the queue after they were submitted by the user and before they went live on the site. The aim was to remove offending material from the ad, or delete the ad entirely, before it was widely disseminated. The second tier moderation ("Tier II") was done on "live ads" – those that had already been posted. It appears that the moderators for each of these tiers applied similar tests for detecting offensive material. However, as remains the case today, there were no uniform standards for what to do when a violation was detected. Moreover, what moderators did in response to a violation evolved over time. So, for instance, one moderator (Vaught) testified that early in her tenure she would edit the text of ads to remove offensive words. The ad would be posted, but without the offensive words. Later this changed, and moderators were instructed to delete ads which contained offensive words rather than edit them.[19]

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[19]This change from editing words to deleting ads was likely based on an interpretation of the CDA which generally counsels against editing of content on third party ads in order to

It appears that sometime in the fall of 2010, Backpage began to significantly upgrade its moderation process. It is unclear whether this was caused by the intensifying public criticism of Craigslist (which was the industry leader at the time), the decision by Craigslist to shutdown its adult classified section in early September 2010, or simply the substantially increased flow of escort advertisements to Backpage caused by the Craigslist shutdown. Likely, all of these factors contributed Ernie Allen reported that shortly after Craigslist decided to shutdown its adults classified in September 2010, he contacted Backpage in an attempt to persuade them to shut down as well. In addition, shortly after the Craigslist shutdown, on September 21, 2010, a subset of the National Association of Attorneys General wrote to Backpage and pressed them to shut their adult classified section.[20] Whatever the specific reason, external pressures appear to have driven a substantial change in the fall of 2010.

Three significant changes took place in the fall of 2010. First, Backpage outsourced its Tier I moderation to a California-based company with moderators in India (El Camino Technologies). Starting in late October 2010 and continuing until the fall of 2012, these Indian moderators were conducting Tier I moderation based on instructions given to them by Carl Ferrer and Operations Manager Andrew Padilla at Backpage.[21] As one witness recently testified (Ronan), this gave the Phoenix-based moderators an opportunity to spend more time on Tier II moderation.

Second, the rules for what could be posted – particularly the content of photographs – became more restrictive. Full nudity (male or female) was no longer allowed, rules for how breasts needed to be covered were developed (pixelation or covering with an object was not accepted, but hands were accepted), and it appears that more terms were banned. Alterations to these standards continue to evolve to this day. So, for instance, while the rules generally became more restrictive from October 2010 forward, in the winter of 2012, the "boob rules" and "butt crack" rules were relaxed for some unexplained reason. One witness (Vaught) testified that in the fall of 2012 new more restrictive rules on images were once again announced (no "on all fours" on a bed, no "just butt" photos, etc.).[22]

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maintain civil immunity.

[20]Interestingly, Liz McDougall, who was then in private practice and representing Craigslist, testified at the same Congressional hearing as Francey Hakes on September 15, 2010. During that hearing McDougall accused Backpage of being one of the more irresponsible web sites which benefitted from the shutdown of Craigslist's adult section.

[21]Occasionally, Joye Vaught, Padilla's deputy, gave instructions to El Camino employees.

[22]It should be noted that while witnesses testified in the grand jury as recently as December 20 about the new rules, a random cursory review of one Backpage site (in Portland, Oregon) revealed clear violations of many of these rules.

Third, Backpage started a dialogue with NCMEC, signed two related MOUs with NCMEC, set up a regular reporting link on their internal web site, and engaged in regular (seemingly monthly) consultations with members of the NCMEC staff. It should be noted that this NCMEC interaction was prompted by a call from Ernie Allen to representatives of Backpage, rather than the other way around. In addition, Allen bluntly told Backpage representatives (including Larkin, Lacey, Ferrer and others) at the outset of the relationship that he believed that the only way to prevent child trafficking on classified sites was to shut the adult section of the site down. (He had reached this conclusion after working with Craigslist and the NAAG for an extended period of time.) Allen said that Backpage agreed to continue to talk with them about how they could improve their moderation process, but Backpage said it was too economically dependent on the adult pages to shut them down. (Also, Lacey bluntly told Allen that the adult prostitution issue was beyond NCMEC's mission.)

By the fall of 2010, approximately 150 terms were banned from the site. These terms (including misspellings and acronyms) referred to specific types of sex acts. If users attempted to post ads containing these words, the user would not be permitted to post the ad. If an ad contained an alternative spelling of the term and it passed the automatic filter, the Tier I and Tier II moderators were instructed to delete the ad. Similarly, ads which offered a plainly illegal act (sex for a fee) using unique terms would be deleted. Notably, even though some individuals who violated these rules were clearly in the business of prostitution (or plainly evidencing their intent to sell sex via Backpage), only their offending ads were deleted; other non-offending ads remain on the site and the user was typically not blocked from further use of the site. (Apparently, only serial violators are blocked from using the site. It remains unclear what it takes to qualify as a serial violator. Yet, even serial violators, by simply creating a new email account, can start posting again immediately, since Backpage only verifies user accounts by an email address. There does not appear to be a system employed to keep track of those individuals banned from the site other than by banning a single email address.)

After the fall of 2010, images were reviewed both for the age of the poster and for the explicitness of the content. Generally, photos which violated the terms of use (nudity, insufficient covering, sex acts, etc.) would simply be deleted and the edited ad (with the remaining suggestive photos) would be posted. There was inconsistent testimony regarding the intersection of offending words and images. One witness (Hammer) testified that if he saw the words "$180 for 1 hr" and a picture of an explicit sex act, he would simply delete the sex act picture and permit the ad to go live. Another witness (Ronan) testified that he would delete the whole ad because he recognized that the person was offering sex for a fee. Neither testified that they would delete the user account even if they thought that the ad in question was an offer of sex for a fee.

With respect to the review of images for underage users, the witnesses have said that they seek to keep any underage person from any part of the adult section, whether they are posting escort ads or other ads. In emails to the Indian moderators, Padilla instructed them to be over-inclusive. He directed them to report anyone whom they believed to be under age 21. The Backpage witnesses who testified had more confused (and possibly more subtle) rules they

applied, but it generally boiled down to, if you were worried that someone was under 18, you reported it internally, and if it was obviously a child you deleted the ad and reported it internally. Notably, there was no coherent training for how to detect a minor or distinguish a young adult from a teenager. Other than one witness's statement that he looked for braces in photographs (too young) or facial wrinkles (old enough), they generally said they looked for users who "looked young." They had no specific criteria to assess the photos, whether it be body fat, breast development, or other features.

Once a moderator identified a suspected underage ad, they would leave the ad live (unless it had an explicit reference to underage sex – such as the term "lolita" – in which case they would delete the ad) and send the URL to senior reviewers. Those reviewers would make a second assessment and, if they believed it to be of a minor, they would refer it to NCMEC. They did not delete all of the ads they referred to NCMEC; only those ads for which they had a high level of confidence were minors were deleted. (In this way, Backpage appeared to be covering itself by reporting, but continuing to benefit from the stream of advertisements from that user.)

To be sure, Backpage was not doing all it could to prevent sex trafficking on its site.[23] The most significant failing of Backpage's screening process is that it screens for words and images but not for individual advertisers who are clearly prostitutes. Thus, so long as an individual does not use banned terms or post banned photographs, that individual is allowed to purchase as many advertisements as she wants. Moreover, if a person uses banned terms which obviously offer sex for a fee, the advertisement is deleted, but the user is typically not banned. So long as the user subsequently conforms the language and images she uses, even if Backpage has been alerted to the fact that she is in the business of selling sex for a fee, she is permitted to post ads using the same user account.

There is one other troubling aspect of Backpage's moderation process. Even though Backpage has publicly claimed that it has the most advanced moderation process of any classified site, it appears that its internal rules are largely unwritten. Employees are trained to know it when they see it, but are not provided a set of written rules about what is permissible and what is not. (The contract operation in India made up their own set of written rules based on sporadic advice from Ferrer, Padilla and Vaught.) More importantly, there are no rules or consistent practices about what is to be done with persons who violate the word or picture standards. Witnesses in the grand jury gave substantially different answers when asked about similar hypotheticals.

V. Assessment of Backpage's Advice of Counsel Defense

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[23] Attached as Exhibit 3 is a list of things which Backpage could have done to substantially reduce prostitution on its site. Backpage has rejected some of these suggestions in the past. It is likely that it has done so because it would substantially reduce the income it makes from the site.

Another issue which is likely to be central to this case is the extent to which Backpage can defend itself by relying on advice given to it by outside and in-house counsel. As outlined below, while Backpage does not appear to qualify for a traditional advice of counsel defense, it is likely that the issue would make its way into any trial of this case as some form of good faith defense.

The evidence gathered to date reveals that VVMH and Backpage consulted extensively with outside counsel about the legality of operating the adult services portion of its web site. In addition, during the period that Craig Capital was negotiating to purchase Backpage (June - October 2011), there were extended discussions between potential investors and Backpage's outside counsel regarding the legality of the site. While we have not obtained much information regarding the advice of in-house counsel (including the advice given by attorney Don Moon, who served on the VVMH board for many years and who had regular contact with NCMEC about the site, and Liz McDougall, who was hired as general counsel in 2012), it is hard to imagine that there are not internal memoranda which discuss the companies' liabilities, and lay out the legal protections under which they operate.

In sum, based on what we have seen to date, VVMH and Backpage received advice from outside counsel that they could not be held civilly or criminally liable for publishing "third party content" in the form of classified advertising. Likewise, the investment bank assisting VVMH in marketing Backpage (Duff & Phelps), and several potential investors in Backpage, consulted with Backpage's outside counsel and their own counsel and received advice that the operation was lawful. Notably, it does not appear that counsel considered Backpage's potential liability for money laundering. However, some of the sweeping statements made by counsel regarding Backpage's immunity from prosecution could give rise to some form of good faith defense.

Notably, because current counsel for Backpage (Mark Bartlett) has repeatedly claimed in court that there is no crime to be investigated by the grand jury, we specifically requested that he provide us with any material which would support an advice of counsel defense. We told counsel that if he believed he had a valid defense we would give it serious consideration. His response was that he could not provide an advice of counsel defense until he knew what crimes we were investigating. He also said that he believed that Francey Hakes's testimony before Congress was in effect an advice of counsel defense.

As outlined below, based on evidence gathered to date it does not appear that Backpage has a valid advice of counsel defense. While lawyers told the Backpage principals that publishing third party content would not subject them to liability, that advice was not rendered before Backpage embarked on the conduct. While the Ninth Circuit has not so expressly held, at least one circuit has concluded that one of the core elements of an advice of counsel defense is that the advice was sought in good faith before embarking on the otherwise criminal conduct. In addition, there are serious questions as to whether Backpage disclosed to its lawyers all relevant facts – another essential element of the defense.

The foundational case on the advice of counsel defense is the Supreme Court's decision in *Williamson v. United States*, 207 U.S. 425, 453 (1908):

> [I]f a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do ... and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves willful and unlawful intent; even if such advice were an inaccurate construction of the law.

More recently, the Ninth Circuit concluded, "[a]n advice-of-counsel instruction requires the defendant show that he made a full disclosure of all material facts to his attorney and that he then relied 'in good faith on the specific course of conduct recommended by the attorney.'" *United States v. Bush*, 626 F.3d 527, 539 (9th Cir. 2010) *quoting United States v. Ibarra-Alcarez*, 830 F.2d 968, 973 (9th Cir.1987). The Ninth Circuit Model Criminal Jury Instruction reads:

> One element that the government must prove beyond a reasonable doubt is that the defendant had the unlawful intent to [*specify applicable unlawful act*]. Evidence that the defendant in good faith followed the advice of counsel would be inconsistent with such an unlawful intent. Unlawful intent has not been proved if the defendant, before acting, made full disclosure of all material facts to an attorney, received the attorney's advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith.

See Ninth Circuit Model Criminal Jury Instructions (2010 Ed.) §5.9.

There remains some lack of clarity in the Ninth Circuit regarding the timing of obtaining an attorney's advice. While it can be inferred from the language employed by the Ninth Circuit that one must obtain advice of counsel before engaging in the conduct, there is no case which expressly so holds. By contrast, the Seventh Circuit has made clear in several reported decisions that obtaining the advice before commencing the conduct is necessary:

> [t]he advice-of-counsel defense requires a defendant to establish the following elements:(1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

United States v. Cheek, 3 F.3d 1057, 1061 (7th Cir.1993) (internal quotation and citation omitted). At least one other circuit employs instructions which require that the advice be sought before embarking on a course of action. *See, e.g. Pattern Crim. Jury Instr. 11th Cir.* SI

18 (2010). There are also some helpful cases which reject advice of counsel defenses when the advice is sought after the conduct has started; in those cases, the courts view the seeking of advice after the conduct has commenced as a means for justifying criminal conduct rather than a good faith attempt to clarify legal liability before plotting a future course. *See, e.g. United States v. Al-Shahin*, 474 F.3d 941, 947-48 (7th Cir. 2007); *United States v. Evans*, 2010 WL 3186121 (N.D. Ga. Apr. 13, 2010) report and recommendation adopted in part, rejected in part, 2010 WL 3189708 (N.D. Ga. Aug. 11, 2010).

Backpage is also likely to claim that it has a more generalized good faith defense even if it does not meet the terms of the advice of counsel defense. Such a defense should also be rejected because it only applies to a narrow range of offenses which are not at issue in this case. The good faith defense is typically asserted in response to a fraud charge, where the government must prove a specific intent to defraud, and in tax cases where there is a requirement that a defendant willfully failed to pay his taxes. *See, e.g. Cheek v. United States*, 498 U.S. 192, 202 (person charged with tax evasion entitled to have a "good faith" defense instruction); *United States v. Chavis*, 461 F.3d 1201, 1209 (10th Cir. 2006)("good faith" defense in fraud case, collecting cases). Courts have more generally noted that generalized good faith defenses are only available when the government has to prove specific intent.

What is concerning is that there is a very low bar for asserting an advice of counsel defense or a good faith defense, and a court may permit Backpage to introduce the opinions it received from counsel during the course of its conduct. *See, e.g. United States v. Sarno*, 73 F.3d 1470, 1487-88 (9th Cir. 1995)("The quantum of evidence sufficient to support a 'theory of the case' instruction is slight indeed. ")(citations omitted). Thus, even if a jury should reject advice of counsel and good faith defenses, the opinions of counsel may play a significant role in any prosecution brought. As a result, we have outlined below the advice received.

The earliest evidence we have of Backpage seeking legal advice on their conduct is from a January 26, 2011, email from Jed Brunst (comptroller of VVMH) to Scott Lebovitz (member of the VVMH board from Goldman Sachs) which appended a legal opinion from attorneys at Thompson Coburn LLP in St. Louis, Missouri (the "Coburn Memorandum"). This memorandum appears to have been written in connection with a civil action brought in the Eastern District of Missouri by a child prostitute against VVMH and Backpage.com. *See M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011).[24] That suit, which was filed on September 16, 2010, arose out of a successful federal criminal prosecution of Latasha Jewell McFarland for 18 U.S.C. § 1952(a)(3); McFarland sexually trafficked M.A. *Id.*

The Coburn Memorandum is not framed as an opinion letter – outlining the specific facts disclosed by the client, discussing the applicable law, and rendering advice about a

[24]The District Court granted a motion to dismiss the complaint on August 15, 2011, concluding that the suit was precluded by the CDA, 47 U.S.C. § 230.

specific course of future conduct – nor does it appear that the opinion was sought before Backpage entered into the course of conduct. Portions of the Memorandum appear to be drawn from pleadings filed in the Missouri case. Nonetheless, the 31 page memorandum provides a detailed explanation for why Backpage has no liability associated with publishing third party classified advertisements. While the memo is primarily aimed at the potential civil liability faced by Backpage and VVMH, it can readily be read to encompass both civil and criminal liability. For instance, the title of the memorandum is, "Why Village Voice Media's Backpage.com Service Does Not Create Liability for Promoting Prostitution." The initial discussion in the memorandum addresses the protections provided by the CDA and acknowledges that the protections do not extend to federal criminal law. Memorandum at 4. However, the memorandum goes on to advise that even if the protections provided by the CDA did not apply to Backpage, it could not be held criminally liable because it had no intent to engage in criminal conduct: "Knowledge that a business's service or liability will be used for criminal purposes is not enough to hold the business criminally liable, where there is no intent or purpose to further or promote the illegal activities." *Id.* at 17. The Memorandum goes on to advise that absent the CDA, "the First Amendment would prevent imposition of criminal liability on Village Voice in this situation." *Id.* at 23.

As noted, the Coburn Memorandum appears to be an *ex post* justification of Backpage's conduct in response to a suit brought by a teenage prostitute. For this reason alone, the Court should exclude evidence and argument about an advice of counsel defense. In addition, there appear to be important factual misstatements which could prevent Backpage from meeting the Ninth Circuit's standard for an advice of counsel defense. *See United States v. Bush*, 626 F.3d 527, 539 (9th Cir. 2010) ("An advice-of-counsel instruction requires the defendant show that he made a full disclosure of all material facts to his attorney "). For instance, the Memorandum claims that, "Backpage.com requires the use of a credit card. This deters users from posting ads for illegal services, since a record is kept that can be used by law enforcement officials." *Id.* at 15. Evidence gathered to date reveals that Backpage knew that prepaid credit cards, which cannot be traced back to a user, were routinely used to purchase advertisements on its site. In addition, Carl Ferrer suggested in an email in 2011 that Backpage look for other means of payment, such as postal money orders. Likewise, much of the memorandum is premised on the notion that only a small fraction of ads on the site relate to illegal services: "It is only a small number of categories where some users post ads for illegal services and those ads generally have only a short life, since Village Voice takes them down when it becomes aware of them." *Id.* at 29. It does not appear that Backpage disclosed to its attorneys the 2010 letter from several Attorneys General noting that, "[w]e believe that ads for prostitution – including ads trafficking children – are rampant on the site . . ." or the AIM Group report in January 2011which concluded that Backpage was the primary marketplace for online prostitution.

In the context of offering Backpage for sale in the early summer of 2011, there were extended discussions between and among Backpage representatives (Larkin, Brunst, and Ferrer), the Duff & Phelps deal team (Althoff, Lobel, Rapp and others), the potential buyers (Craig, Bryan, and Zucker), and outside counsel for Backpage (SNR Denton, including Samuel Fifer, James Coleman and Jeff Modisett) about the legal risks associated with the business.

Both the Duff & Phelps deal team and the prospective buyers sought assurances from counsel that the business could be operated legally. The lawyers from SNR Denton provided such assurances: James Coleman provided those assurances at the kick-off meeting with Duff & Phelps in Phoenix in March 2011; Samuel Fifer and Jeff Modisett (a former Attorney General of Indiana) provided similar assurances to the potential buyers in a series of calls and emails in September 2011. Moreover, SNR Denton reviewed and approved the language used in the various prospectuses issued by Duff & Phelps to market Backpage.[25] (Craig 1155).

While these communications with Backpage's outside counsel could provide the prospective investors with an advice of counsel defense – if they had consummated the purchase – this advice would not fall within the traditional elements of the advice of counsel defense for Backpage as outlined above.[26] It was not sought by Backpage to determine whether Backpage's future conduct would be lawful; it was sought to market the company to others to purchase.[27]

One final observation is important. Backpage and VVMH were receiving legal advice from a VVMH board member, Don Bennett Moon, for many years. Billing records reveal that Moon was paid for legal services by the companies. Moreover, Moon was involved in many of the discussions with NCMEC and with the Washington Attorney General's Office. It is quite possible that Moon has provided some form of advice of counsel memorandum to the company which we have not seen. Likewise, VVMH hired Liz McDougall in the winter of 2012 as general counsel. While she was hired long after Backpage began engaging in the conduct, Backpage will likely seek to press at trial the number of lawyers that reviewed its operations

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[25]For instance, the potential buyers wrote a memorandum to their primary investors in July 2011 that, "Village Voice's outside counsel is highly confident that Backpage has no potential legal liabilities because of the ads on its internet site." (Craig 1595).

[26]There was some suggestion by one witness (Althoff) that SNR Denton was advising Backpage on liability issues before Duff & Phelps was approached to market the company in the spring of 2011. If that is the case, it may be that the SNR Denton lawyers provided Backpage with a more traditional advice of counsel defense letter which we have not seen. However, like the Coburn Memorandum, any advice does not appear to have been obtained before Backpage embarked on its course of conduct.

[27]One of the prospective purchasers of Backpage, Charles Craig, obtained an informal opinion in July 2011 from an attorney from Arnold & Porter regarding the legality of the operation of the site. That opinion focused primary on the CDA and the protections it provided from civil liability. However, with respect to criminal liability the memorandum noted that while prosecution for aiding and abetting had "been thrown around," such a charge was "highly unlikely as websites have no duty to monitor third party content." Of course, since it is unlikely that Backpage ever saw this memorandum, it should not be able to use it as part of an advice of counsel defense. Nonetheless, if any of the prospective investors are called by the defense to testify, there is little double that Backpage will seek to elicit this information.

and then advised it that its conduct was legal. Backpage is also like to press the claim that this repeated reassessment of its conduct gives it some form of good faith defense.

VI. Conclusion

At the outset of this investigation it was anticipated that we would find evidence of candid discussions among the principals about the use of the site for juvenile prostitution which could be used as admissions of criminal intent. It was also anticipated that we would find numerous instances where Backpage learned that a site user was a juvenile prostitute and Backpage callously continued to post advertisements for her. To date, the investigation has revealed neither. In fact, the investigation has revealed a strong economic incentive for Backpage to rid its site of juvenile prostitution. It has also revealed that Backpage managers and executives have been very cautious about their admissions to knowing use of the site by prostitutes.

Admittedly, we have not obtained the internal emails from Backpage or VVMH, and it is prudent to await Judge Jones's decision on this issue. But given the testimony we have heard from Backpage employees and those involved in the marketing of Backpage, the likelihood that such written admissions exist is not high.

In moving forward, while completing several key steps in the criminal investigation is prudent, it is appropriate to take a hard look at bringing this case as a civil forfeiture case, with its concomitant lower standard of proof and the ability to use experts to fill important evidentiary gaps.